

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 76-4272

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SAMUEL LIEFER AND HARRY OSTREICHER,
A COPARTNERSHIP, d/b/a RIVER MANOR
HEALTH RELATED FACILITY, AND LOCAL
531, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

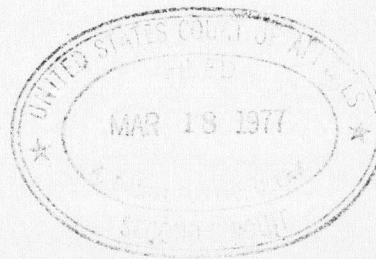
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that River Manor interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a whole supports the Board's findings that River Manor violated Section 8(a)(2) and (1) of the Act by recognizing and bargaining with Local 531 when Local 531

did not represent an uncoerced majority of its employees and by otherwise unlawfully assisting Local 531, and that Local 531 violated Section 8(b)(1)(A) of the Act by entering into a recognition agreement with River Manor when it did not represent an uncoerced majority of the River Manor employees.

3. Whether substantial evidence on the record as a whole supports the Board's findings that River Manor discharged employees Brenda Frazier, Albert Hazell, and Mary Terrell because of their activities on behalf of Local 144, in violation of Section 8(a)(3) and (1) of the Act.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order issued against Samuel Liefer and Harry Ostreicher, a copartnership doing business as River Manor Health Related Facility (hereinafter "River Manor"), and Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 531" or "Local 531, Teamsters") on May 28, 1976 and reported at 224 NLRB No. 38 (A. 30-33, 39-40).^{1/} This Court has jurisdiction, the unfair labor practices having occurred at Brooklyn, New York, where River Manor operates a nursing home.

^{1/} "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "GCX", "RX", and "PIX", refer to exhibits, not reproduced in the appendix but lodged with the Court, which were introduced by the General Counsel, River Manor, and Local 531, respectively.

I. THE BOARD'S FINDINGS OF FACT

A. The status of LPN's

River Manor commenced operations in August 1974.^{2/} For several months thereafter, only two floors of its six-floor facility were in operation (A. 5; 375).

The licensed practical nurses (hereinafter "LPN's"), aides, and orderlies were under the supervision of Registered Nurse Elsie Harrington, Director of Nurses at River Manor. Harrington was a supervisor, and was responsible for hiring and firing employees and preparing work schedules and assignments (A. 5; 756, 767). The LPN's were not supervisors (A. 7). However, they directed the aides and orderlies in performance of medical treatment; in case of emergency, they could change the floor assignment of an aide or orderly (A. 6; 211, 501, 713-714, 795-796). They also transmitted instructions from Harrington to the aides and orderlies, and warned them about lateness on Harrington's instructions (A. 17; 443, 500, 697, 711). In turn, the LPN's transmitted information to Harrington concerning, inter alia, the performance and work habits of aides and orderlies (A. 17; 341-342, 699, 769, 796). They also gave the employees their pay checks (A. 7; 313, 377, 711), and, when a replacement was needed for an aide or orderly who could not come to work, called individuals whose names were on a list maintained by Harrington (A. 5; 701-702, 822-823, 863-864). On the night shift (midnight to 8 a.m.), no supervisors were present,

^{2/} Unless otherwise indicated, all dates refer to the year 1974.

and the LPN's had to call Harrington or a doctor for instructions (A. 6; 717, 768, 793-794).

B. The organizational campaigns

Three unions made efforts to organize the employees of River Manor: Local 531, Teamsters; Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, affiliated with Service Employees International Union, AFL-CIO (hereinafter "Local 144"); and Local 1115, Joint Board, Nursing Home and Hospital Employees division (hereinafter "Local 1115"). In early September 1974, Frank McKinney, a business representative of Local 144, visited River Manor and met with Harrington and Harry Ostreicher, one of the owners of River Manor. He suggested that they consider hiring members of Local 144 who had been employed at another nursing home which had recently closed (A. 18; 634-637). In late October or early November, another business agent for Local 144 told Ostreicher that it was interested in organizing the employees of River Manor (A. 18; 638-639). Subsequently, McKinney passed out leaflets outside River Manor on several occasions, but whenever he tried to enter the building, a guard stopped him, saying he had instructions not to let in anyone from Local 144 (A. 19; 641-645, 650-652). On one such occasion, in February 1975, McKinney observed representatives of Local 531 coming out of the building (A. 19; 651). Finally, on May 1, 1975, McKinney got into the building after telling the guard he was there to attend a union meeting. However, Laufer, the Assistant Administrator of River Manor, threatened to call the police. When the police came, McKinney and the other representatives of Local 144 who had accompanied him left (A. 19; 654-655).

William Morales, a business representative of Local 1115, distributed authorization cards outside the premises on several occasions in October and November, and also distributed cards inside after one of the employees let him into the kitchen. However, on December 12, when he entered through the front door and told Administrator Marvin Ostreicher that he wanted the same opportunity to speak to employees that other unions had received, Ostreicher said that Morales was not allowed on the premises and that if he did not leave, Ostreicher would call the police (A. 19; 355-357).

C. River Manor assists Local 531's
organizational campaign

On October 23, Ostreicher introduced Harrington to two representatives of Local 531. Harrington said she was not interested in a union. The union representatives then asked whether any LPN's were around. Harrington introduced them to Mercado, the LPN on the day shift (8 a.m. to 4 p.m.) (A. 7; 315-316, 330, 868-869). Thereafter, the Local 531 representatives came into the kitchen during working time and solicited cards from employees. The representatives were seen speaking to Ostreicher in the dining room (A. 8; 111, 122).

The Local 531 representatives gave cards to Mercado, who in turn gave them to the aides and orderlies on her shift. She also gave Allen, the LPN on the 4 p.m. to midnight shift, cards to be distributed to the aides and orderlies on that shift, and additional cards to be distributed by Russell, the LPN on the midnight to 8 a.m. shift (A. 7-8; 317-318). Mercado and Russell solicited signatures from all the employees on their shifts (A. 17, fn. 20; 311, 318, 320, 735).

Mercado told Mary Townsend, an aide, that Local 531 was a good union and that Harrington wanted everyone to hurry up and join it so they could get more benefits. She said that she herself had signed a card. Townsend said she wanted to think it over. Mercado replied that if Townsend wanted to continue working at River Manor, she had better sign the card. Townsend signed it on November 20 (A. 10; 47, 186-188).

Albert Hazell, an orderly on the night shift, signed a card for Local 531 on November 28. He received the card from Link, an LPN who worked on the night shift in Russell's absence. Link told Hazell that Harrington wanted him to fill out the card and return it to Link the next day without telling other employees about it. Hazell did so (A. 10; 207). He had previously signed a card for Local 531 in October; the employees who gave him that card told him that Harrington had said he had to sign the card to keep his job (A. 10; 230). Also in late November, ^{3/} LPN Russell asked Brenda Frazier, an aide on the night shift, to sign a card for Local 531. Frazier protested that she was working in a nursing home and Local 531 was a truck drivers' union. Russell replied that Harrington had said that employees who did not sign cards for Local 531 would be fired. Frazier signed the card (A. 10; 363-365).

Russell also gave a card to Dennis Williams, a night shift orderly, in the presence of Hazell and Frazier. She said that Harrington had

^{3/} Williams' card for Local 531 was dated November 27; Frazier's was dated November 28 (A. 10, fn. 5; 79-80). However, it is clear that both cards were signed on the same night (A. 10, fn. 5; 725-726).

given her the card for Williams to sign and wanted it back the next morning. Later, Russell asked for the card again; when Williams asked why she wanted it so quickly, she said that Harrington had said that anyone who did not sign the card would be fired. Williams, who had put the card in his locker, retrieved it at the end of the shift, signed it, and returned it to Russell (A. 10; 493-494).

In early December, Russell gave Alma Robinson, a night shift aide who had been hired a few days earlier, a card for Local 531 and told her to sign it. The next day, Russell asked her whether she had signed the card. When Robinson said she had not, Russell got her another card and told her to sign it at once because Harrington wanted it. Robinson then signed the card and returned it to Russell (A. 11; 454-455).

In mid-December, LPN Pierre told aide Mary Terrell that she had heard that Local 531 was coming in and that an employee named Mitchell had been appointed to represent the aides, while Mercado had been appointed to represent the LPN's. Terrell pointed out that the employees had not elected these representatives, and asked who had appointed them. Pierre told her "Use your head; nobody but Harrington and Ostreicher appointed them" (A. 12; 574-575).

On December 9, after an arbitrator had conducted a card check and certified that Local 531 had authorization cards from a majority of River Manor's employees, River Manor and Local 531 entered into a recognition agreement (A. 8; 81-83). They subsequently had a number of bargaining sessions, but no contract was ever signed (A. 18; 568, 678-679, 684-685).

In mid-January, 1975, when employees came to Harrington to get their pay checks, she gave them membership application and checkoff authorization cards for Local 531. She also left cards for the evening and night shift employees in an envelope with their pay checks, and informed the evening shift LPN that she had done so. The evening shift LPN similarly informed the night shift LPN (A. 17; 740-741). Other employees received their pay checks from bookkeeper Abraham Zehnworth.^{4/} He gave these employees the application and checkoff authorization forms, and told them that they had to sign the forms to get their checks. He also sent checkoff forms to the LPN's for employees who had not picked up their checks in his office, and told the LPN's to have the employees sign the forms in order to get their checks (A. 17-18; 117, 783-896).

D. The discharges of Frazier, Hazell and Terrell

Albert Hazell was hired as an orderly in September 1974. Brenda Frazier was hired as an aide on October 30. Both worked on the night shift (A. 19, 22; 205-206, 209, 363). In early January, 1975, they and two other night shift employees discussed unionism in the presence of Russell. They discussed the fact that they had not heard from Local 531 after signing cards for it. One of the other employees, who had been a member of Local 144, suggested that they try to bring it in. The others agreed that it was a good union, and it was decided that Frazier would call the New York State Labor Relations Board (hereinafter "the State Board") to find out how to bring it in (A. 20; 214-217, 366-367, 496-497).

^{4/} Zehnworth's status as an agent of River Manor was admitted (A. 891).

Frazier told the State Board that the employees had been forced to sign cards for Local 531 and wanted to get another union to represent them. The State Board agent said that they should get a majority of the employees to sign cards for their union and take the cards to that union, which would approach management. He also said that the employees could not be punished for doing this (A. 20; 367). Frazier gave Hazell this information; he subsequently called the State Board and visited it in person, and received the same information (A. 20; 219, 368). He made an appointment to meet McKinney, the Local 144 representative, on the night of January 9. Frazier, who was not scheduled to work that night, met them in front of the nursing home. After a brief conversation, McKinney gave some authorization cards to Hazell. Frazier signed one of the cards and left; Hazell went into the building to work (A. 20; 220-221, 294, 371).

On the morning of January 10, Frazier received a telephone call from Harrington, who said she would have to let Frazier go, because she had heard that Frazier was talking to other employees about Local 144. Harrington said another union would be in the nursing home the following week. She did not mention the fact that Frazier had frequently been late to work (A. 20; 372, 416).

Hazell gave out authorization cards to many employees, and obtained at least 15 signed cards (A. 22; 222-225, 292). He also asked LPN Russell to sign a card, but she refused on the ground that she did not intend to remain at River Manor for long (A. 22; 226). Hazell also gave

authorization cards to Spadaro, an aide on the day shift, who in turn gave them to Mary Terrell, because she was afraid to distribute them (A. 24; 584). Terrell, hired on December 4, 1974, as an aide on the day shift, had talked with other aides about Local 144 after receiving an authorization card from Business Representative McKinney in mid-December (A. 24; 572-573). On January 12, she gave cards to at least five other aides, picked up the signed cards, and gave them to Hazell. He told her that Frazier had been discharged, and he expected to be the next employee discharged (A. 24; 584-587).

On January 13, Terrell was not scheduled to work. Harrington called her at home and told her not to come in any more, because Harrington was not satisfied with her work (A. 24; 588). Harrington had not previously warned Terrell about her performance or attitude (A. 24; 588, 924-925).

That same morning, Harrington called Hazell to her office just before he was scheduled to leave work. She told him that she understood that he had been handing out cards for Local 144, and that because of this and his work, she had to let him go. She did not say what was wrong with his work, but said his job had been temporary. Hazell pointed out that it was illegal for management to bring in a union. Harrington replied that she did not know anything about a union. Hazell asked why she had told LPN Link to give him a union card. Harrington did not reply. Hazell asked who was representing the employees in Local 531. Harrington said that LPN Mercado, the most senior employee, was representing them. Hazell then left (A. 23; 226-228).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the LPN's, although not supervisors, were agents of River Manor, and that River Manor was therefore responsible for their conduct in threatening employees with discharge, and promising them benefits, to induce them to sign authorization cards for Local 531. Accordingly, the Board found that River Manor violated Section 8(a)(1) of the Act by such threats and promises (A. 16-17, 28).

The Board further found that the authorization cards signed by employees for Local 531 were tainted by the unlawful threats and promises, and that, accordingly, Local 531 did not represent an uncoerced majority of the employees when River Manor recognized it. Consequently, the Board found that River Manor violated Section 8(a)(2) and (1) of the Act by recognizing Local 531 as the employees' exclusive bargaining representative, and that Local 531 violated Section 8(b)(1)(A) of the Act by accepting such recognition (A. 17-18). In addition, the Board found that River Manor violated Section 8(a)(2) and (1) of the Act by assisting Local 531 in soliciting authorization cards from its employees (A. 17); by permitting Local 531 to solicit cards from employees during working time and in working areas, while denying similar privileges to Local 144 and Local 1115 (A. 19); and by requiring employees to sign checkoff authorization cards for Local 531 by threatening to withhold their paychecks (A. 18, 38). Finally, the Board found that River Manor discriminatorily discharged Brenda Frazier, Albert Hazell, and Mary Terrell because of their activities on behalf

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of Local 144, and thereby violated Section 8(a)(3) and (1) of the Act (A. 22, 24, 25).^{5/}

The Board's order requires River Manor and Local 531 to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees of River Manor in the exercise of their Section 7 rights. Affirmatively, River Manor is required to withdraw and withhold recognition from Local 531 as the bargaining representative of its employees until it is certified by the Board, and to abrogate its recognition agreement with Local 531; to make Brenda Frazier, Albert Hazell, and Mary Terrell for any loss of pay suffered because of the discrimination against them;^{6/} and to post appropriate notices. Local 531 is required to post appropriate notices.

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT RIVER MANOR INTERFERED WITH, RESTRAINED, AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS, IN VIOLATION OF SECTION 8(a) (1) OF THE ACT

As shown in the Statement, supra, LPN's Mercado and Russell

^{5/} The Board found it unnecessary to determine whether River Manor and Local 531 violated Section 8(a)(3) and Section 8(b)(2) of the Act, respectively, by requiring employees to sign checkoff authorization cards, since such a finding would not affect the remedial order (A. 38). The Board found that the discharge of employee Allrich Normil in April 1975 was not motivated by his activity on behalf of Local 1115 or his giving an affidavit to the Board, and therefore did not violate Section 8(a)(1), (3), or (4) of the Act (A. 28).

^{6/} The three discriminatees were reinstated in April 1975 (A. 29; 588, 933a).

directly threatened employees with discharge unless they signed authorization cards for Local 531, and Mercado also promised an employee more benefits if she signed a card. In addition, LPN's Link and Russell told employees that Director of Nurses Harrington wanted them to sign cards. It is clear that such threats and promises, if attributable to an employer, violate Section 8(a)(1) of the Act. See N.L.R.B. v. Midtown Service Co., 425 F. 2d 665, 667 (C.A. 2, 1970); N.L.R.B. v. A & S Electronic Die Corp., 423 F. 2d 218, 221 (C.A. 2, 1970), cert. denied, 400 U.S. 833; N.L.R.B. v. Revere Metal Art Co., 280 F. 2d 96, 100 (C.A. 2, 1960), cert. denied 364 U.S. 894. Accordingly, if the Board properly found the LPN's to be agents of River Manor, its finding that their threats and promises violated Section 8(a)(1) is entitled to affirmance.

Initially, it may be noted that Local 531's organizational drive did not follow the customary pattern whereby a union first organizes the rank-and-file employees and only then goes to management. Instead, it began with Administrator Ostreicher introducing the Local 531 representatives to Director of Nurses Harrington, who in turn introduced them to LPN Mercado. Mercado, in turn, distributed the cards to all the employees on her shift, and gave cards to the LPN's on the other shifts, with instructions to distribute them. In soliciting signatures, th LPN's made it clear why the employees should join Local 531; Harrington wanted them to.^{7/} Predictably, this argument proved persuasive; as LPN

^{7/} The LPN's denied receiving or carrying out any such instructions, or telling the employees that they were acting on Harrington's behalf, but their testimony was discredited (A. 16). It is settled that "questions of credibility are for the [Administrative Law Judge] (continued)

Russell admitted (A. 694-695, 724), even some employees who had expressed opposition to Local 531 signed cards for it. In these circumstances, the Board properly concluded (A. 16-17) that the LPN's were agents of River Manor carrying out instructions from management. Accordingly, River Manor was properly held responsible for their threats and promises. I.A.M. v. N.L.R.B., 311 U.S. 72, 78, 80-81 (1940).

Even if the LPN's were not, in fact, instructed or authorized to engage in coercive conduct, or even to solicit on behalf of Local 531, River Manor could properly be held liable for their conduct, since employees could reasonably believe that the LPN's spoke for management. I.A.M. v. N.L.R.B., supra, 311 U.S. at 80; N.L.R.B. v. Mississippi Products, Inc., 213 F. 2d 670, 673 (C.A. 5, 1954); N.L.R.B. v. Dayton Motels, Inc., 474 F. 2d 328, 331 (C.A. 6, 1973); N.L.R.B. v. Broyhill Co., 514 F. 2d 655, 657 fn. 5 (C.A. 8, 1975). The LPN's regularly acted as conduits transmitting information from Harrington to the aides and orderlies, and vice-versa. Since they reported the employees' work performance and habits to Harrington, the employees would readily believe that they would also report who

7/ and the Board." N.L.R.B. v. L.E. Farrell Co., 360 F. 2d 205, 207 (C.A. 2, 1966). Accord: N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (C.A. 2, 1952).

That the LPN's were acting on behalf of management is further confirmed by an incident occurring after Local 531 was recognized. An employee who wanted to know who had appointed the employee representatives was told by an LPN to "use her head;" Administrator Ostreicher and Director of Nurses Harrington had clearly appointed them (A. 574-575).

signed, or refused to sign, a card for the favored union. Similarly, since Harrington's warnings about lateness were delivered to employees by LPN Russell, rather than by Harrington herself, the employees would think it natural for Russell also to deliver threats from Harrington concerning unionization. Thus, when the LPN's attributed to Harrington statements that employees not signing cards would be discharged, the employees would take the LPN's at their word; that they did is clearly shown by the fact that night shift employees so readily signed cards despite their expressed opposition to Local 531. The impact of the statements by LPN's could be expected to be especially great on this shift because no supervisor was present; to the night shift employees, the LPN's were practically a part of management. Employees on other shifts could see for themselves that the statements of the LPN's accurately reflected the views of management; they could see representatives of Local 531 not only soliciting cards during working time, but talking to River Manor's administrator (A. 111). Accordingly, River Manor was properly held responsible for the conduct of the LPN's.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT RIVER MANOR VIOLATED SECTION 8(a) (2) AND (1) OF THE ACT BY RECOGNIZING LOCAL 531 WHEN LOCAL 531 DID NOT REPRESENT AN UNCOERCED MAJORITY OF ITS EMPLOYEES AND BY OTHERWISE UNLAWFULLY ASSISTING LOCAL 531, AND THAT LOCAL 531 VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY ACCEPTING SUCH RECOGNITION

As shown supra, agents of River Manor solicited authorization cards for Local 531, and obtained employee signatures by threats of

reprisal and promises of benefit. The Board properly found that, by this conduct, River Manor unlawfully assisted Local 531 in violation of Section 8(a)(2) and (1) of the Act, for "where the employees would have just cause to believe that solicitors . . . for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates." I.A.M. v. N.L.R.B., 311 U.S. 72, 80 (1940). This case is totally unlike cases such as Longchamps, Inc., 205 NLRB 1025 (1973), relied on by River Manor before the Board. Longchamps held that it was not unlawful to permit a union to speak to employees during working time, or to call employees from their work stations to speak to the union representative. In that case, however, there were no threats or promises, and representatives of management not only did not solicit signatures on authorization cards, but were not even present when the cards were signed. Thus, the atmosphere of coercion which existed in the present case was totally lacking in Longchamps.

After forcing employees to sign cards for Local 531, River Manor recognized Local 531 on the basis of a card check in which the unlawfully obtained cards were counted. It is, of course, settled that recognition of a union which does not represent a majority of the unit employees violates Section 8(a)(2) and (1) of the Act, for "once an employer has conferred recognition on a particular organization, it has a marked advantage over any other in securing the adherence of employees."

N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267 (1938),
enfg. 1 NLRB 1 (1935). Similarly, a union violates Section 8(b)(1)(A)
of the Act by accepting exclusive recognition when it lacks majority
status. I.L.G.W.U. v. N.L.R.B., 366 U.S. 731, 738 (1961). Nor does it
matter that Local 531 was not shown to be aware that its apparent
card majority was tainted by employer coercion. If, in fact,
Local 531 did not have a valid majority, it violated the Act, for
"even if mistakenly, the employees' rights have been invaded," and
"prohibited conduct cannot be excused by a showing of good faith."
I.L.G.W.U. v. N.L.R.B., *supra*, 366 U.S. at 739.

In determining whether Local 531 had achieved majority status
when River Manor recognized it, the cards obtained by coercion cannot
be counted. N.L.R.B. v. Revere Metal Art Co., 280 F. 2d 96, 99-100
(C.A. 2, 1960). River Manor, however, contended before the Board
that the coercive activity of its agents Mercado, Russell and Link
was directed to no more than five employees (Townsend, Hazell,
Frazier, Robinson, and Williams), and that invalidation of their cards
would still leave Local 531 with a majority. We submit that the Board
properly rejected this contention. It has been recognized by this Court
and others that mathematical evidence that enough employees were coerced
to destroy the union's majority is not required; a pattern of unlawful
assistance may taint all cards. Amalgamated Local 355 v. N.L.R.B.,
481 F. 2d 996, 1002 n. 8 (C.A. 2, 1973) and cases cited therein. In
the instant case, such a pattern existed. Mercado, the day shift LPN,

and Russell, the night shift LPN, admittedly solicited cards from all the employees on their shifts (A. 311, 318, 320, 735); Mercado obtained cards directly from at least half a dozen employees (A. 326-327). Especially in these circumstances, the Board could properly infer from the five proven instances of coercion that other, unproven instances occurred, and that the coercion of employees by LPN's on two shifts had an indirect effect on other employees solicited by the same LPN's. N.L.R.B. v. Clement Bros. Co., 407 F. 2d 1027, 1029-1030 (C.A. 5, 1969). Moreover, coercion may also be inferred as to other employees, such as those who saw Local 531 representatives talking to Administrator Ostreicher (A. 111). Thus, the Board was warranted in concluding that River Manor violated Section 8(a)(2) and (1) of the Act by recognizing Local 531 and Local 531 violated Section 8(b)(1)(A) by accepting recognition.

The pattern of assistance to Local 531 continued after it had been unlawfully recognized. While representatives of Local 531 were permitted to solicit even during working time and in working areas, representatives of Local 144 and Local 1115 were refused admission to the building; when they protested this treatment, River Manor threatened to call the police. Such disparate treatment of competing unions plainly constitutes unlawful assistance in violation of Section 8(a)(2) and (1) of the Act, for "freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterances." I.A.M. v. N.L.R.B.,

supra, 311 U.S. at 78. Accord: Majestic Molded Products, Inc. v. N.L.R.B., 330 F. 2d 603, 607 (C.A. 2, 1964).

Finally, River Manor's bookkeeper, Zehnworth, admitted (A. 895-896) that in mid-January, a few days after River Manor had discriminatorily discharged three leading adherents of Local 144 (see infra, pp. 19-27), he told employees that they had to sign checkoff authorization cards for Local 531 to get their pay checks. Even if River Manor had lawfully recognized Local 531, requiring employees to sign checkoff authorization cards would have been a violation of Section 8(a)(2) and (1) of the Act. Paranite Wire & Cable Division, Essex Wire Corp., 164 NLRB 319, 320, 323 (1967). Since the recognition of Local 531 was unlawful, the requirement that employees sign checkoff authorization cards before getting their pay checks was a fortiori unlawful. N.L.R.B. v. Getlan Iron Works, Inc., 377 F. 2d 894, 896 (C.A. 2, 1967); N.L.R.B. v. American Beef Packers, Inc., 438 F. 2d 331, 333 (C.A. 10, 1971), cert. denied, 403 U.S. 919.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS
A WHOLE SUPPORTS THE BOARD'S FINDINGS
THAT RIVER MANOR DISCHARGED EMPLOYEES
BRENDA FRAZIER, ALBERT HAZELL, AND MARY
TERRELL BECAUSE OF THEIR ACTIVITIES ON
BEHALF OF LOCAL 144, IN VIOLATION OF
SECTION 8(a)(3) AND (1) OF THE ACT

Notwithstanding River Manor's extensive assistance to Local 531, as detailed supra, several River Manor employees sought, in early January 1975, to bring a union of their choice, Local 144, into the nursing home. Within a few days, three of those employees were discharged. This Court has held that a finding by the Board that a discharge was discriminatorily motivated "cannot lightly be overturned." United

Aircraft Corp. v. N.L.R.B., 440 F. 2d 85, 92 (C.A. 2, 1971). We now show that the Board was warranted in finding that the discharges were discriminatory and therefore violated Section 8(a)(3) and (1) of the Act.

A. Brenda Frazier

Frazier, a nurses' aide, was one of the night shift employees who had signed a card for Local 531 under threat of discharge, after expressing opposition to that union. She was the employee chosen by the others to contact the State Board to find out how to bring in Local 144. This selection was made in one of several conversations about Local 144 which took place in the presence of LPN Russell, who, as has been shown supra, pp. 3, 14-15, frequently transmitted information concerning employees to Harrington. Thus, the Board could reasonably infer that management was aware of Frazier's role in the Local 144 organizational campaign.

On the night of January 9, 1975, Frazier, although not scheduled to work, came to the nursing home to meet Local 144's business representative, saw him give authorization cards to another night shift employee to distribute, and signed a card herself. The very next morning, she was discharged by Harrington, who explained that she had heard that Frazier was talking to other employees about Local 144 (A. 372).^{8/} This was

^{8/} River Manor contended before the Board that Frazier had been discharged on January 9, before her meeting with the Local 144 representative. The Board, on the basis of credibility resolutions, rejected this contention, noting especially that Frazier had not told the union representative or Hazell that she had already been discharged, and that it was unlikely that, after being told by the State Board that she could not be discharged for organizing a union, she would fail to inform her fellow organizers of such a discharge (A. 21). The Board's finding on this point was clearly reasonable and should be affirmed.

"an outright confession of unlawful discrimination [which] . . . eliminate[s] any question concerning the intrinsic merits as to . . . the discharge . . . , the precise evidence showing management's knowledge that . . . [she was] engaged in union activity, or other causes suggested as the basis of the discharge." N.L.R.B. v. Ferguson, 257 F. 2d 88, 92 (C.A. 5, 1958).

In the instant case, other evidence also indicates that Frazier's activity on behalf of Local 144 prompted her discharge. As noted supra, the discharge immediately followed Frazier's open pro-Local 144 activity. This Court has often recognized that timing of a discharge is persuasive evidence of discriminatory motivation. N.L.R.B. v. Dorn's Transportation Co., 405 F. 2d 706, 713 (C.A. 2, 1969).

Also significant is the preference of River Manor for Local 531, a preference carried to the point of committing extensive unfair labor practices to enable that union to obtain signed authorization cards from a majority of the employees. In this context, a discriminatory motive for the discharge of a leading adherent of a union opposed by the employer may properly be inferred. N.L.R.B. v. Advanced Business Forms Corp., 474 F. 2d 457, 465 (C.A. 2, 1973); N.L.R.B. v. Midtown Service Co., 425 F. 2d 665, 671 (C.A. 2, 1970).

River Manor contended before the Board that Frazier was discharged for excessive lateness. The Board, however, was warranted in rejecting this contention. While Frazier was late a substantial number of times, so were many other employees, some of whom had not been employed as long

as Frazier, but had been late almost as many times (A. 21-22; GCX 24-26). Indeed, Director of Nurses Harrington admitted that lateness was a common occurrence at River Manor, especially on the night shift, on which Frazier worked, and that the location of River Manor made it difficult to get employees to work there on a shift beginning at midnight (A. 22; 825-826, 851).^{9/} Only one other employee was ever discharged for lateness.^{10/} The disparity of treatment between Frazier and other employees who were frequently late suggests that River Manor was more concerned with her support for Local 144 than with her lateness. See N.L.R.B. v. D'Armigene, Inc., 353 F. 2d 406, 409 (C.A. 2, 1965); N.L.R.B. v. Milco, Inc., 388 F. 2d 133, 139 (C.A. 2, 1968).

Nor does the fact that Frazier had been warned about her lateness require a contrary result. Harrington, who discharged Frazier, did not speak to her directly about lateness, but asked LPN Russell to do so. However, she also asked Russell to speak to other night shift employees, who were not subsequently discharged (A. 798, 834), and she did not say that Frazier would be discharged if her record failed to

^{9/} River Manor was located on East 104th Street in Brooklyn. Frazier lived in the Bronx; it took her at least 45 minutes to drive to River Manor (A. 304, 402).

^{10/} That employee's name, and the circumstances of her discharge, do not appear in the record. However, Harrington testified (A. 824) that she worked on the day shift. Thus, no employee on the night shift, other than Frazier, was ever discharged for lateness, despite the fact that it was an especially serious problem on that shift.

improve (A. 838). This Court has upheld findings that a discharge was discriminatory even where the employee had previously been warned.

N.L.R.B. v. L.E. Farrell Co., 360 F. 2d 205, 208 (C.A. 2, 1966).

Especially in light of the evidence of discriminatory motive set forth supra, the Board could properly view this case as an example of the settled principle that "The existence of a valid ground for discharge is not justification when it is a mere pretext, nor when the discharge is not solely on this ground, but partly on an impermissible ground."

N.L.R.B. v. Dorn's Transportation Co., 405 F. 2d 706, 713 (C.A. 2, 1969).

In this case, there was ample evidence that lateness alone did not bring about Frazier's discharge.

B. Alber Hazell

Hazell, like Frazier, had signed an authorization card for Local 531 under duress. However, in January 1975, he became the most active adherent of Local 144, obtaining signed cards for that union from at least 15 employees. He even asked LPN Russell to sign a card (A. 226). In addition to soliciting on his own shift, he gave cards to an employee on another shift, and received signed cards back from her, commenting that Frazier had been discharged and he expected to be next. This prediction proved accurate; the next day, only 4 days after he had begun distributing cards for Local 144, Hazell was discharged.

Hazell, like Frazier, was told by Harrington that he was being discharged because of his activity on behalf of Local 144 (A. 226-227). The Board could properly infer that his activity, like Frazier's, was

known to management in view of his solicitation of LPN Russell, frequently a source of information for management. The timing of his discharge, like that of Frazier's -- coming right on the heels of his open and substantial activity on behalf of a union opposed by River Manor -- strongly indicates a discriminatory motive.

Moreover, the reasons advanced by River Manor before the Board for Hazell's discharge are most unpersuasive. Because he was attending school at night, his off nights were Monday and Wednesday. River Manor contended that this was contrary to its policy of giving employees consecutive nights off; that because of this policy, it had hired Hazell only temporarily; and that he was discharged because the arrangement was causing serious problems, as it required giving other employees non-consecutive nights off. However, the arrangement has been in effect for more than 3 months, and there is no evidence that whatever inconvenience it caused other employees suddenly became intolerable to them or to River Manor in January. Nothing was different except Hazell's support for Local 144. Moreover, Hazell was never asked to change his working schedule, or given an opportunity to choose between changing it or giving up his job. Instead, he was summarily discharged shortly after his activities for Local 144 commenced. These circumstances strongly suggest a discriminatory motive. N.L.R.B. v. Dorn's Transportation Co., supra, 405 F. 2d at 713.

At the hearing before the Board, Harrington testified to other alleged reasons for discharging Hazell. She said he was late to

work too often, had not been doing his work properly, and, on his last two days, had been talking to other employees on the job. Hazell was never warned about any of these alleged derelictions, nor were they mentioned at the time of his discharge. Harrington did say that she was discharging him because of his work, as well as his activity on behalf of Local 144, but refused to tell him what was wrong with his work (A. 227). The lack of prior warning, the refusal to tell Hazell the reason for his discharge, and the shift in the asserted grounds for the discharge all lend support to the Board's conclusion that Hazell's support for Local 144 was the true reason for his discharge. N.L.R.B. v. Montgomery Ward & Co., 242 F. 2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829; N.L.R.B. v. Milco, Inc., 388 F. 2d 133, 139 (C.A. 2, 1968); N.L.R.B. v. Griggs Equipment, Inc., 307 F. 2d 275, 278 (C.A. 5, 1962); A.J. Krajewski Mfg. Co. v. N.L.R.B., 413 F. 2d 673, 675-676 (C.A. 1, 1969). With respect to Hazell's talking to other employees on his last two days of work, he was, as the Board noted (A. 23-24), undoubtedly talking to them about Local 144. There is no evidence that River Manor generally prohibited employees from talking to each other on the job. On the contrary, as shown supra, pp. 5-18, solicitation on behalf of Local 531 was permitted in working areas during working time. Thus, if Hazell's talking on the job played any part in his discharge, the Board could reasonably find that it was the fact that he was speaking in favor of Local 144, rather than simply the fact that he was speaking, which was intolerable to River Manor.

C. Mary Terrell

Terrell was hired in early December, and River Manor's preference for Local 531 was soon made clear to her. An LPN told her that Administrator Ostreicher and Director of Nurses Harrington had appointed the employee representatives for Local 531. In mid-December, Terrell signed a card for Local 531 after being solicited by Harrington (A. 14; 577-580). However, she also spoke in favor of Local 144 to other aides in mid-December. LPN Pierre was present during this conversation. On January 12, 1975, another day shift aide, who had received authorization cards for Local 144 but feared that she would be discharged if she distributed them (this was two days after Frazier's discharge), gave the cards to Terrell. Terrell distributed the cards, obtained signed cards from several employees, and returned them to Hazell, who said that Frazier had been discharged and predicted (accurately) that he would be discharged next. Terrell said that, if he was discharged, she probably would be, since she had not tried to conceal her support for Local 144 (A. 587). She was, in fact, discharged the next day.

In summary, Terrell, Local 144's most active adherent on the day shift, was discharged on the same day as the leading Local 144 supporter on the night shift, one day after she had openly solicited on behalf of Local 144, and 3 days after the discriminatory discharge of Frazier. The Board could properly find that this was no coincidence. N.L.R.B. v. United Mineral & Chemical Corp., 391 F. 2d 829, 833 (C.A. 2, 1968).

This is especially true since River Manor's explanation of Terrell's discharge, like its explanation of the other two discharges, does not withstand scrutiny. The asserted grounds for the discharge were Terrell's poor work and attitude, but Harrington admittedly never warned her about either before summarily discharging her (A. 838, 841-842). Harrington was also unable to cite any specific instance when she talked to Terrell about her work, and the alleged incident which led Harrington to describe Terrell's attitude as "snippy" was found by the Board, on the basis of credibility resolutions, never to have occurred (A. 24, fn. 24).^{11/} Moreover, Terrell's alleged deficiencies do not explain the "stunningly obvious"^{12/} timing of her discharge; there is no evidence that her work deteriorated significantly just before her discharge, or any other explanation of why her deficiencies became intolerable just when she began to campaign actively for Local 144. Accordingly, the Board was justified in rejecting River Manor's explanation for the discharge and in viewing the activity on behalf of Local 144 as the true explanation.

^{11/} Even if the incident occurred, the Board could properly find that it was not the reason for Terrell's discharge. Terrell simply said that she did not have to take orders from LPN Russell, which was true, since Russell, as the Board found (A. 7), was not a supervisor. Moreover, Harrington admittedly never spoke to Terrell about this alleged incident (A. 842).

^{12/} N.L.R.B. v. Rubin, 424 F. 2d 748, 750 (C.A. 2, 1970).

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)

Petitioner,)

v.)

No. 76-4272

SAMUEL LIEFER, etc. d/b/a)

RIVER MANOR HEALTH FACILITY,)

Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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